

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.52 OF 1991

1. Smt.Ambubai Dhondibai Nirmal
2. Rangrao Dhondiba Nirmal
3. Sadashiv Dhondiba Nirmal
4. Mahadeo Dhondiba Nirmal
5. Indubai Balasaheb Patil

All agriculturists, R/o.
Mauje Kandalgaon,
Tal: Karvir, Kolhapur

..Appellants
(Original Plaintiffs)

versus

1. Shri Ramchandra Daulu Mirmal
(since deceased through legal heirs)
- a. Shivaji Ramchandra Nirmal
agriculturist, R/o. Kandalgaon,
Tal : Karvir, Kolhapur
- b. Shri Lalu Ramchandra Nirmal
agriculturist, R/o. Kandalgaon,
Tal : Karvir, Kolhapur
- c. Sou. Balabai Appasaheb Chavan
Occ: Household, R/o. Kogil Khurud,
Tal: Karvir.
2. Babu Daulu Nirmal
3. Radhabai Daulu Patil
Nos.2 and 3
agriculturists, R/o. Kandalgaon,
Tal : Karvir, Kolhapur
4. Babubai Anna Khot,
agriculturist, R/o. Kaneriwadi
Tal : Karvir, Kolhapur
5. Shrimabai Dyandeo Kadam,
agriculturist, R/o.C.S.No.1933,

E Ward, 12th lande,
Rajarampuri, Kolhapur.

6. Hirabai Laxman Sakpal,
Household, R/o. Salunke Nagar Park,
(New Vasahat) Subhash Nagar,
Kolhapur.
7. Subhash Ganu Nirmal,
agriculturist, Kandalgaon,
Tal : Karvir, Kolhapur
8. Mahatmaji Ganu Nirmal
(since deceased through legal heirs)
 - a) Smt. Ashabai Mahatmaji Nirmal
agriculturist, R/o. Kandalgaon,
Tal : Karvir, Kolhapur
 - b) Kum. Sunita Mahatmaji Nirmal
(through 8a)
 - c) Kum. Anita Mahatmaji Nirmal
(through 8a)
 - d) Kumar Pravin Mahatmaji Nirmal
(through 8a)
9. Krishnat Ganu Nirmal
R/o. Salunke Nagar Park
(New Vasahat) Subhash Nagar,
Kolhapur.
10. Jivabai Hari Patil
agriculturist, R/o. Kandalgaon,
Tal : Karvir, Kolhapur

..Respondents
(Original Defendants)

Mrs. Teja Katdare for the Appellant

Mr.V.S.Gokhale for Mr.B.P.Apte for the Respondent

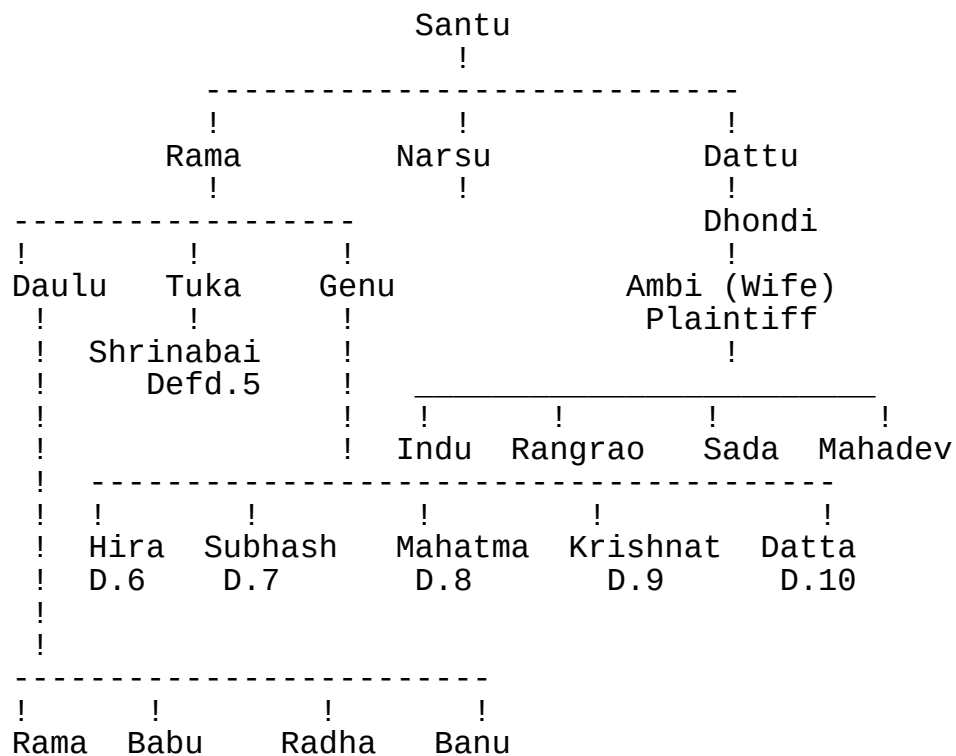
Coram : S.R.Sathe, J.
Dated : 13th April, 2006

ORAL JUDGMENT

1. Appellants, the original plaintiffs in
Regular Civil Suit No. 539 of 1983 have preferred

this appeal against the judgment and order passed by the Court of 5th Additional District Judge, Kolhapur, in Regular Civil Appeal No. 150 of 1996 whereby the judgment and order passed by the Court of Jt.C.J.J.D., Kolhapur, dismissing the plaintiffs suit for partition and separate possession was confirmed. For the sake of convenience hereafter the parties shall be referred to as plaintiffs and defendants.

2. In order to appreciate the facts of the case it would be worthwhile to set out the genealogy showing the relationship between the plaintiffs and defendants.



D1 D2 D3 D4

. Plaintiffs case in brief is that the suit properties which are agricultural lands situated at village Kandalgaon, Tal : Karvir, Dist: Kolhapur described in detail in paragraph 1 of the plaint are the ancestral properties of the plaintiffs and defendants. For the sake of convenience plaintiffs and defendants are residing and messing separately, so also they are cultivating the lands separately. Some of the said lands which are being cultivated by the plaintiffs are recorded in their names in the record of rights while the lands which are being cultivated by defendants are entered in their names. Besides this some lands are standing in the joint names of plaintiff and defendants. Though the lands have been entered in the names of plaintiffs and defendants separately actually the same have not been partitioned. At the time of application of the provisions of Bombay Prevention of Fragmentation and Consolidation of Holding Act to the village there were some mistakes in recording the names of the parties in the record of rights. Though the said claim was thereafter discontinued and withdrawn, so far as village Kandalgaon is concerned this earlier entry is continued. According to plaintiffs taking

advantage of the fact that some of the lands are standing in the name of defendants they started obstructing the plaintiffs. Not only that but defendants also filed some suit against the plaintiffs. The plaintiffs therefore asked the defendants to partition the suit property. However, the defendants refused. According to plaintiffs they are together having one half share in suit lands and the defendants together are also having one half share in the suit lands. It is also the case of the plaintiffs that the lands described at serial Nos.2 and 3 in paragraph No.1 of the plaint were sold by the predecessor of defendants 1 to 5 to the defendant No.11. Plaintiffs therefore filed the above mentioned suit for partition and separate possession.

3. The defendants 1 to 10 filed their written statement and opposed the suit claim. They admitted the relationship between the parties as shown in the genealogy, however, contended that partition has already taken place between the predecessor of plaintiffs and defendants long back and since then entries in the record of rights have been made accordingly. After the said entries the parties are cultivating the lands separately as shown in the

record of rights. They therefore contended that the plaintiffs case that the partition has never taken place is not legal and correct. They also contended that the entries in the record of rights have been made in pursuance of the partition and actual cultivation by the respective parties. They also denied the plaintiffs allegations that taking undue advantage of the fact that some of the lands are standing in their names they tried to obstruct the plaintiffs possession of the suit land. Thus, according to defendants the plaintiffs are not having one half share in the suit land and as the partition has already taken place the suit for partition is liable to be dismissed. The defendants also contended that the defendant No.11 has been necessarily impleaded in the present suit. Hence, on the these grounds the defendants prayed for dismissal of the suit.

4. The Defendant No.11 filed his written statement at Exhibit 21B and opposed the suit claim. He contended that the suit lands have been purchased by them him the year 1952 by virtue of registered sale deed from the ancestors of the defendant Nos.1 to 10. He also contended that the plaintiffs and

defendants were residing separately and the suit property is not the joint family property as alleged by the plaintiffs. The defendant No.11 also therefore prayed for the dismissal of the suit.

5. On these pleadings the learned trial Judge framed issues at exhibit 27. In order to prove the suit claim, on behalf of the plaintiffs Sadashiv Dhonduram Nirmal i.e Plaintiff No.3 was examined at Exhibit 77, while on behalf of the defendants 1 to 9 defendant No.1 was examined. Both the parties produced several documents, mainly the 7 X 12 extract and the revenue receipts. After considering the said evidence the learned judge came to the conclusion that the partition had already taken place between the ancestors of plaintiffs and defendants about 25 years back and the suit property was not the joint family property on the date of the suit. He, therefore, dismissed the plaintiffs suit for partition and separate possession.

6. Being aggrieved by the said judgment and order the original plaintiffs preferred regular Civil Appeal No.150 of 1986. However, the same also came to be dismissed as First Appellate Judge also felt that the partition had already taken place.

7. The concurrent finding that the partition has already taken place between the plaintiffs and defendants and the suit properties are not joint family properties on the date of suit is challenged in the present second appeal.

8. From the perusal of the record it appears that while admitting the appeal this Court (Coram: A.A.Desai, J.) has passed the following order.

"Admit. Whether the circumstances indicated on record are sufficient to constitute partition between the parties would be the substantial question of law involved in this appeal"

9. In this appeal before me the learned Advocate for the Appellants/original plaintiff has urged only two points, firstly she submitted that both the courts below in the absence of any documentary evidence regarding previous partition ought to have held that the property is joint family property. Secondly, she canvassed before me that both the courts below have not properly appreciated

the evidence on record and have wrongly held that the partition has taken place between the plaintiffs and defendants predecessor about 25 years back. She, therefore, submitted that the appeal be allowed and plaintiffs suit for partition and separate possession be decreed in their favour. As against this Shri Gokhale, the learned Advocate for the defendants supported the judgment and order passed by the trial courts.

10. The relationship between the parties is not in dispute. It is also an admitted fact that the predecessor of plaintiffs and defendants 1 to 10 had formed a joint family and the said lands were owned and possessed by the said joint family. it is the case of plaintiff that though the suit lands are cultivated separately by the plaintiffs and defendants, there is no partition as such and it is only for the sake of convenience that the parties are cultivating the lands separately. As against this it is the specific contention of the defendants that partition has already taken place between their ancestors long back about 25 years and since then the defendants are cultivating the lands which are given to their branch while the plaintiffs are cultivating the lands which are given to their

branch. Naturally the burden lies on the defendants to show the previous partition.

11. At the outset it must be mentioned that even according to defendants there was no written partition but it was oral partition. However, curiously enough the defendants have not specifically stated as to who were the witnesses present at the time of partition. Naturally, under such circumstances while deciding the question of previous partition one has to take into consideration the other circumstances and mainly the conduct of the parties.

12. It is needless to say that partition has severance of joint status and as such it is a matter of individual volition. All that is therefore necessary to constitute a partition is a definite and unequivocal indication of the intention by a member of a joint family to separate himself from the family and enjoy sharing in severality. Once a member of the joint family has clearly and unequivocally intimated to the other members his desire to sever himself from the joint family, his right to obtain and possess the share is unimpeachable. Bearing in mind this position of

law, we have to scan the evidence on record.

13. It is clear from the plaintiffs own evidence that is, P.W.1 Sadashiv- Exhibit 77, that they are residing separately atleast since the time he started understanding things. He has given deposition in the court at the age of 34, so one can safely say that for last more than 25 years the plaintiffs and defendants are residing separately. They are having separate messing arrangement. What is more to be noted is that even the lands are being cultivated by them separately. Again it is pertinent to note that certain suit lands are standing exclusively in the name of plaintiffs while certain suit lands are standing exclusively in the name of defendants. If really there would have been any partition as contended by the defendants then normally we would have found initially all the suit lands in the joint names of the ancestors of the plaintiff/defendants and after their death in the name of present plaintiffs and defendants. But the position is different. From the revenue receipts produced by both the parties, it is quite evident that there are different Khata numbers of plaintiffs and defendants. This also indicates that the lands in question have been held by them separately as

owners and this must have happened as a result of partition. The plaintiff could not point out any such incident, where the land though standing in the name of defendants, it is being cultivated by the plaintiffs. That revenue of the land is being paid by the respective parties means the land which are standing in the name of plaintiffs are being cultivated by plaintiffs, they are paying the revenue, while the lands which are standing in the name of defendants, they are paying the revenue. the plaintiffs could not bring on record even a single concrete evidence which would show that the suit property is never partitioned.

14. It is the case of the plaintiff that when the provisions of Bombay Prevention of Fragmentation and Consolidation of Holding Act were made applicable to their village some incorrect entries were made and the same remained even after the time the application of the act was withdrawn subsequently. For that purpose reliance has been placed on extract in form No.6 produced at Exhibit 58, 59 and 60. The said lands are shown in the name of Daulu Rama, while the land bearing No.30-A/6, 34/4, 65/1, 91/5 are standing in the name of Dhondi Dattu Nirmal i.e. the husband of original plaintiff

No.1. Then, again the land bearing block Nos.91/1, 91/4, 95/21, 95/23 are standing in the exclusive names of the defendants branch. No explanation is put forward by the plaintiffs as to why all the above mentioned lands have been shown exclusively in the name of the defendant branch. It does appear from the record that plaintiffs had made some application regarding making grievance about the said entries. However, it appears that though the RTS Appeal was preferred the same was not finally decided and in that ultimately plaintiff had in fact not adduced any evidence. On the contrary, the defendants had filed their written submissions.

15. Much is made about the mutation extract dated 8.4.1954 produced at exhibit 71 by the plaintiff. It shows that Rama had intimation that the lands bearing No.30/20, 30/22, 30-A/16 and 30/18 be entered in their name as they satisfied the mortgage loan. However, this mutation entry being of 1954 no weightage can be given to the same particularly when we find that subsequent to that period the lands in question are in fact standing in the names of the parties separately. So, the above mentioned mutation entry had exhibit 71 by itself will be of no use to prove the plaintiffs case.

16. It is tried to be argued on behalf of the plaintiffs that the partition as alleged by the defendants itself shows that it was not equitable because $\frac{2}{3}$ rd share was given to them while $\frac{1}{3}$ rd share was given to the plaintiff. However, one is in fact not in a position to state what is meant by $\frac{2}{3}$ rd share and $\frac{1}{3}$ rd share in the suit property. Whether deponent had in fact meant that it is as per the value of the said lands or whether it was as per the acreage of land or whether it has on the basis of number of pieces of lands. So, one such stray admission would be of no use. It is come on record that the partition took place after the death of Narsu. Admittedly, Narsu died issueless. Naturally, the entire ancestral property was to be divided between the plaintiffs branch and the defendants branch equally. Merely because at one stage the defendants have stated that they received $\frac{2}{3}$ rd share we can't jump to the conclusion that the partition had not at all taken place. If really it would have been the case that plaintiff received more share than defendant then normally the defendants would have asked for reopening the partition as the earlier partition being unequal. But we find that plaintiffs have come with a

specific case that partition had never taken place. Unfortunately, the plaintiffs could not adduce any cogent and convincing evidence to prove their stand. On the contrary, the evidence shows that for last about 25 years the plaintiffs and defendants are residing separately, messing separately, cultivating the lands separately, enjoying the fruits of the property separately, they are having different khatas, they are having different house property standing in their respective names and the said house property is also not shown as the joint family property. All these circumstances are sufficient to show that the partition had taken place between plaintiff and defendants long back. Incidentally, it must also be noted that the presumption about the jointness is more in respect of the father and son than between the brothers, but it goes on decreasing to their heirs. So, considering the fact that the main plaintiff and defendants are the cousin brothers and sisters and having regard to all the facts and circumstances and the evidence on record and preponderance of probabilities, it must be said that both the courts below have rightly held that plaintiffs have failed to prove that the suit properties are the joint family properties. The findings recorded by both the courts below are legal

and correct. There is no reason to interfere with the same. In this view of the matter, there is no substance in the appeal. The appeal is dismissed.

. Considering the peculiar circumstances of the case there is no order as to costs.

(S.R.Sathe, J.)